STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION,

Plaintiff-Appellee,

v

ANTHONY JAKE HATCHETT, JEROME HARRY, EDNA HARRY, PAUL HARRY, and TONYA MARIE TOBY,

Defendants,

and

MAGED AL-SHIMARY, as Administrator for the Estate of AAIED JASEM MOHAMED, and MONA MJEED, individually and as Next Friend of FARKAD AAIED MOHAMED, HAUSSIM AAIED MOHAMED, and SAIF AAIED MOHAMED,

Defendants-Appellants.

UNPUBLISHED
April 26, 2007

No. 271908
Wayne Circuit Court
LC No. 05-515970-NZ

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendants appeal by delayed leave granted[1] the trial court's grant of summary disposition in favor of plaintiff Auto Club Insurance Association in this personal injury case. We affirm.

In the early morning of June 14, 2002, Aaid Jasem Mohamed was shot to death by defendant Anthony Hatchett in a parking lot near the Iraqi New Restaurant in Detroit.[2] Hatchett

[1] Defendants filed this appeal as a claim of right. In lieu of dismissing the claim as untimely, this Court treated the claim as a delayed application for leave and granted it.

was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, for the shooting.[3] The shooting occurred shortly after the Detroit Red Wings won the Stanley Cup. According to the deposition of Paul Harry (Harry) in the instant case,[4] he was riding a bicycle through the neighborhood shouting about the victory, after having consumed alcohol and marijuana. He rode past the restaurant where decedent and others told him to shut up and go home. Harry stopped, and a group of men crossed the street and confronted him. One man showed him a knife and told him to leave.

Harry went to the home of his aunt, defendant Tonya Toby, and told her about the incident. Hatchett, who was at the home, apparently overheard him. Hatchett and another man, known as "Danny," urged Harry to return to the restaurant to fight the man who had pulled the knife. They told Harry that they would accompany him in case someone "jumped" him. Harry maintained that he did not know whether any of the others were armed. As the group approached the restaurant, Harry entered an alley that would take him behind the restaurant. He thought the others were behind him, but instead, Hatchett and the third person apparently continued down a sidewalk in front of a group of stores to approach the men. Harry came through the alley and asked the person who had shown him the knife whether he wanted to fight Harry "one on one." The man did not reply. Harry saw Hatchett approach, and heard a shot. Harry did not see who was shooting, and thought it may have been one of the group of men who had threatened him.

Paul Harry pleaded guilty to manslaughter, MCL 750.321, on September 29, 2004. Harry admitted that he knew that Hatchett was carrying a gun, and that a fight was going to occur.

On June 11, 2004, decedent's estate and the other defendants filed suit against Hatchett, Harry, Toby, and Harry's parents, Jerome and Edna Harry, alleging claims for wrongful death, intentional aggravated assault and battery, negligence, intentional infliction of emotional distress, loss of consortium, statutory liability under MCL 600.2913,[5] and ethnic intimidation. Plaintiff had issued a homeowners insurance policy to Jerome and Edna Harry that was in effect at the time of the shooting. Coverage, if applicable, extended to Paul Harry.

The homeowner's insurance policy provided that benefits were payable for an "accident." The policy defined "accident" as "a fortuitous event or chance happening that is neither

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(…continued)

[2] Plaintiff Mona Mjeed was decedent's spouse. Plaintiffs Farkad Aaied Mohamed, Haussim Aaied Mohamed, and Saif Aaied Mohamed are decedent's minor children.

[3] This Court affirmed Hatchett's convictions. *People v Hatchett*, unpublished per curiam opinion of the Court of Appeals, issued July 11, 2006 (Docket No. 261132).

[4] We note that Harry provided markedly different versions of the actual shooting during his initial statement to the police and at Hatchett's trial. However, because his current version of the events is the most favorable to his position, we analyze the viability of defendants' arguments in light of these statements. Our analysis also incorporates the concessions Harry made during his plea proceedings.

[5] This section provides for limited liability to parents for damage or personal injury done by a child.

reasonably anticipated nor reasonably foreseen . .. .” The policy also contained intentional acts exclusions that precluded coverage for:

> 5. bodily injury or property damage resulting from an act or omission by an insured person which is intended or could reasonably be expected to cause bodily injury or property damage. This exclusion applies even if the bodily injury or property damage is different from, or greater than, that which is expected or intended.
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> * * *
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> 10. bodily injury or property damage resulting from:
>
> a. a criminal act or omission committed by anyone; or
>
> b. an act or omission, criminal in nature, committed by an insured person even if the insured person lacked the mental capacity to:
>
> (1) appreciate the criminal nature or wrongfulness of the act or omission; or
>
> (2) conform his or her conduct to the requirements of the law; or
>
> (3) form the necessary intent under the law.
>
> This exclusion will apply whether or not anyone, including the insured person;
>
> a. is charged with a crime;
>
> b. is convicted of a crime whether by a court, jury or plea of nolo contendere; or
>
> c. enters a plea of guilty whether or not accepted by the court;

Plaintiff filed a declaratory action seeking judgment that the exclusion relieved it of the duty to defend or indemnify the Harrys in the underlying suit. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court held that the exclusion applied, and granted plaintiff’s motion.

We review de novo a trial court's decision to grant or deny summary disposition. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). The proper interpretation of a contract constitutes a question of law subject to de novo review. *Id.*; *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003).

Courts construe the terms of insurance policies in accordance with well-settled principles of contract construction. *Farmers Ins Exchange*, *supra* at 417. Insurance companies may define or limit the scope of their coverage under an insurance contract as long as the language leads “to only one reasonable interpretation” and does not contravene public policy or violate applicable statutory regulations. *Id.* at 418. In contrast, when the language in an insurance contract is subject to more than one reasonable interpretation, it is considered ambiguous. *Id.* An

ambiguous provision in an insurance contract must be construed against the drafting insurer and in favor of the insured. *Id*. The mere fact that a policy fails to define a particular term does not render it ambiguous. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, undefined words are to be given their common and ordinary meaning, taking into consideration the text and relative subject matter. *Id*. at 356-357; *Marcelle v Taubman*, 224 Mich App 215, 219; 568 NW2d 393 (1997). If the provision is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994).

The duty to defend and the duty to indemnify are separate and distinct. *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 506; 362 NW2d 767 (1984); see also *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004). The duty to defend is broader than the duty to indemnify. *St Paul Fire & Marine Ins Co v Michigan Mut Ins Co*, 469 Mich 905; 668 NW2d 903 (2003), citing *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-452; 550 NW2d 475 (1996). An insurer's duty to defend extends to cases in which the allegations "even arguably come within the policy coverage." *American Bumper & Mfg Co*, *supra*; *Illinois Employers Ins*, *supra*. Generally, any doubt regarding the extent of coverage must be resolved in the insured's favor. *Id*.

In the instant case, even accepting Paul Harry's current version of the evening's events as true, the trial court did not err when it found that plaintiff did not have a duty to defend or indemnify Paul Harry, Jerome Harry, or Edna Harry.

A criminal conviction is admissible in a declaratory action to determine whether an insurer has a duty to defend and indemnify its insured. *Allstate Ins Co v Freeman*, 432 Mich 656, 687 n 24; 443 NW2d 734 (1989); *State Farm Fire & Cas Co v Fisher*, 192 Mich App 371, 376; 481 NW2d 743 (1991). Paul Harry pled guilty to manslaughter. At the least then, he admitted his guilt as to the elements of involuntary manslaughter.[6] Harry essentially conceded: 1) that he committed an unintentional killing; 2) that he did so with the intent to injure or in a grossly negligent manner; and 3) that he proximately caused the death of decedent. *People v Holtschlag*, 471 Mich 1, 8, 21-22; 684 NW2d 730 (2004); *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). Gross negligence in the context of involuntary manslaughter involves: (1) knowledge of a situation requiring the use of ordinary care and diligence to avoid injury to others; (2) an ability to avoid harm by using ordinary care and diligence; and (3) the "failure to use care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." *People v Albers*, 258 Mich App 578, 582; 672 NW2d 336 (2003). A defendant is criminally, or grossly negligent when "the actor realizes the risk of his behavior and consciously decides to create that risk. . . . The actor does not seek to cause harm, but is simply 'recklessly or wantonly indifferent to the results.'" *McCoy*, *supra* at 502 (citations omitted). Here, in addition to the general admission of gross negligence that Paul Harry's guilty plea includes, he specifically admitted during the plea hearing that Hatchett was carrying a gun and that a fight was going to occur.

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[6] MCL 750.321 applies to both voluntary and involuntary manslaughter.

The intentional/criminal act exclusion above clearly bars recovery, irrespective of whether the language in paragraph 10 above would absolve plaintiff from responsibility simply due to the fact that Hatchett shot decedent. Using only the fact of Harry's conviction, we hold that the conviction and concurrent admissions resolved any factual issue with respect to Paul Harris' responsibility for the shooting. His actions constituted a criminal act and the death "resulted from" that act, even though Hatchett was the actual shooter. We find that plaintiff had no duty to defend or indemnify here, irrespective of whether the death of decedent was "intended" or "reasonably expected" by Paul Harris.

Defendants' attempt to compare this case to *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283; 683 NW2d 656 (2004), is without merit. The "criminal acts exclusion" policy language in *McCarn*, *supra*, precluded coverage only for circumstances similar to those found under paragraph 5 above. *id*. at 289, and did not contain the broader exclusionary language set out in paragraph 10 of the instant policy.

Defendants argue that because plaintiff was obligated to defend and indemnify Paul Harry, it was also required to provide coverage for the derivative claims against Jerome Harry and Edna Harry for a violation of MCL 600.2913. However, because we find that the central claim against Paul Harry is not covered under the policy, we also find that the claims against his parents are excluded under negligent supervision exclusion in the policy.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood